

**Leslie Taylor  
Associates**

Telecommunications Consultants  
6800 Carlynn Court  
Bethesda, Maryland, 20817-4302  
Tel: (301) 229-9341  
Fax: (301) 229-3148

February 14, 1996

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

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**FEB 14 1996**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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Dear Mr. Caton:

Enclosed for filing on behalf of E-SAT, Inc. is an original and nine (9) copies of its Petition for Rulemaking to Establish Rules for Licensing Second-Round Applicants in the Non-Voice, Non-Geostationary Mobile Satellite Service.

If you have any questions regarding this filing, please contact the undersigned.

Sincerely,

Guy T. Christiansen

cc: Chairman Reed E. Hundt  
Commissioner Andrew C. Barrett  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness  
Commissioner James H. Quello  
Scott Blake Harris  
Thomas Tycz  
Damon Ladson

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In the Matter of )

E-SAT, Inc. )

File No. RM - \_\_\_\_\_

Petition for Rulemaking to Establish Rules )  
for Licensing Second-Round Applicants )  
in the Non-Voice, Non-Geostationary )  
Mobile Satellite Service )

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FEB 14 1996

To: Secretary, Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

PETITION FOR RULEMAKING

The undersigned applicant, by its attorneys, hereby petitions the Commission to initiate a rulemaking proceeding to develop regulations for the processing of second-round applications in the Non-Voice, Non-Geostationary (NVNG) Mobile Satellite Service (MSS). In processing the second-round applications, the Commission is faced with the challenge of developing an efficient and equitable means of granting licenses, ensuring a competitive marketplace and promoting the public interest. As explained more fully in this petition, the only way to achieve these goals is through a formal rulemaking proceeding.

I. A Formal Rulemaking Is Needed to Ensure Efficient and Equitable Licensing.

The need for a formal rulemaking is driven by the scarcity of spectrum available both domestically and internationally for NVNG MSS. The spectrum available for NVNG MSS is severely limited at present. Of the minimal spectrum allocated to the service internationally, much has already been licensed for use by

the first round U.S. applicants.<sup>1</sup> The Little LEO applicants and licensees have been working diligently to pursue additional allocations for NVNG MSS both domestically and internationally, but these efforts may not yield additional allocations for several years.

The failure to obtain significant additional allocations at WRC-95, and the two-year delay before additional allocations are possible at WRC-97, have confounded the Commission's plan to license second-round applicants using WRC-95 allocations. This has placed the pending applicants in an unusual form of regulatory limbo until additional allocations are obtained at WRC-97. Although current allocations may be sufficient to support only one or two additional systems, assigning the spectrum to only one or two systems and dismissing the remaining applicants at this time would harm U.S. efforts to obtain future allocations, undermine competition, and limit the ability of companies to enter the market to accommodate future demand.

In addition, recent developments demonstrate that the second licensing round cannot be processed fairly and expeditiously under the current licensing rules. There are currently three entities that have been licensed in the first NVNG MSS processing round: Orbital Communications Corporation (Orbcomm), Starsys Global Positioning, Inc. (Starsys), and Volunteers In Technical Assistance (VITA).<sup>2</sup> Orbcomm, Starsys and VITA have applications for additional spectrum

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<sup>1</sup> Orbcomm has filed an application to reduce and re-channelize its spectrum usage from 320 kHz to 280 kHz. See FCC Public Notice, Report No. SPB-28 (October 25, 1995). It is unclear, however, whether the changes proposed by Orbcomm will result in a net increase in the usable spectrum available for licensing second-round applicants.

<sup>2</sup> Orbital Communications, Inc., 9 FCC Rcd 6476 (1994), recon. denied, FCC 95-135 (June 2, 1995); Starsys Global Positioning, Inc., Document No. DA 95-2343 (November 20, 1995); Volunteers in Technical Assistance, Document No. DA 95-1630 (1995).

pending in the second round. VITA has filed for an additional satellite and may require additional spectrum for this satellite. Five other entities - CTA Commercial Systems, Inc., E-SAT, Inc., Final Analysis Communication Services, Inc., GE American Communications, and Leo One USA Corporation - have applications pending in the second round. CTA has filed an application seeking a license to utilize some of the spectrum allocated at WRC-95.<sup>3</sup>

A rulemaking is needed to determine how both the Commission, as well as second-round applicants, can negotiate this awkward period until additional allocations are made. If the Commission proceeds by granting individual applications in a piecemeal fashion, the scarcity of spectrum could seriously impede the prospect of another system being deployed until additional spectrum is allocated internationally or domestically for NVNG MSS. Moreover, acting on some but not all applications could result in a violation of the other applicants' right to comparative consideration.<sup>4</sup>

Without a rulemaking, existing allocations, including those adopted at WRC-95, may be assigned to systems in a manner that is inconsistent with the rights of pending applicants. Clarifying the rights of pending applicants to future allocations will ensure that the U.S. can proceed promptly to develop viable proposals for additional spectrum allocations at WRC-97 while retaining the maximum number of future viable competitors.

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<sup>3</sup> See Minor Amendment of CTA, File No. 23-SAT-P/LA-95, filed January 11, 1996.

<sup>4</sup> See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

## II. Issues to be Considered in the Proposed Rulemaking

### 1. Spectrum Availability

A lingering obstacle to resolution of the pending applications is the fact that neither the Commission nor the pending applicants know exactly how much spectrum is available for second-round licensing. Although spectrum has been allocated to NVNG MSS both domestically and internationally, this spectrum is shared with other services.<sup>5</sup> Consultation with incumbent and co-primary users - particularly governmental users - is needed to determine what spectrum is available and the degree to which sharing is possible. Without such knowledge, it is impossible to determine whether the pending applications are mutually exclusive. This prevents both the Commission and the pending applicants from taking steps to resolve exclusivity, if necessary. The Commission cannot issue licenses at this point simply because it is unknown at present what spectrum is available for licensing. Moreover, evaluating the qualifications of pending applicants before this information is obtained would be futile.

Much of the spectrum allocated for use by NVNG MSS is used by U.S. government systems, mainly those of the Department of Defense and the Department of Commerce. A rulemaking is needed in order for the Commission to define the extent to which these systems are using these bands, the quantity of spectrum that can be used by NVNG MSS systems and the timetable and conditions of such use. With this knowledge in hand, it will then be possible to assess how much spectrum is available for NVNG MSS licensing, the degree of sharing that will be required, and the possibility for future expansion.

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<sup>5</sup> In addition, no proceeding has been initiated to implement domestically the allocations that were recently obtained at WRC-95.

## 2. Second-round Eligibility

The second processing round consists of five applicants that have not yet received licenses or initial allocations and three licensees that are seeking additional spectrum allocations. Leo One and CTA have argued that first round licensees should be excluded from the second processing round.<sup>6</sup> The Commission should seek comment on whether unlicensed applicants should receive priority in assigning second-round spectrum.

E-SAT notes that in licensing the first-round applicants, the Commission reiterated its belief that allowing entry of competitive systems "has always been a major concern" in licensing the NVNG MSS service.<sup>7</sup> The Commission refused to place limits on the spectrum assigned to first-round licensees, however, because it anticipated that additional spectrum "should become available for use in 1997 and beyond, and the majority of the spectrum that will be non-exclusively assigned to licensees can be used by future licensees as well."<sup>8</sup> This policy statement should be taken into consideration as the Commission addresses this issue.

## 3. Second-round licensing rules

Although current spectrum allocations may be insufficient to accommodate all pending applicants,<sup>9</sup> it is possible that there will be sufficient spectrum

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<sup>6</sup> See Letter from Phillip L. Spector (counsel for CTA) to Scott Blake Harris dated February 1, 1996; Letter from Robert A. Mazer (counsel for Leo One) to Scott Blake Harris dated February 2, 1996.

<sup>7</sup> NVNG MSS Licensing Order, 8 FCC Rcd 8450 (1993) at ¶ 20.

<sup>8</sup> Id. at ¶ 21 (footnotes omitted).

<sup>9</sup> As noted above, without an assessment of the current availability of NVNG MSS allocations, the extent of mutual exclusivity among the pending

allocated at WRC-97 to enable most, if not all, pending applicants to implement their systems. The applicants all agree, and market estimates confirm, that demand for NVNG MSS services will be sufficient to support all of the currently proposed systems. If pending applications are dismissed or if the current spectrum is auctioned, the Commission will destroy the progress these applicants have made in developing their systems as well as their incentive for continuing to fight for international allocations of spectrum. This, in turn will inhibit the ability of these and other companies to enter the service as effective competitors in the future. By forcing mutual exclusivity in the present and choosing one provider, the Commission will sacrifice competition in the future, harm this infant industry and sharply curtail user choice.

Because of this short-term scarcity of spectrum, the Commission should consider a number of licensing options to resolve mutual exclusivity such as partial licensing, formation of a consortium or virtual consortium, a negotiated rulemaking or technical solutions. The Commission should also consider whether the use of auctions as a licensing method is appropriate, particularly in light of the strong industry opposition to auctions voiced at the International Bureau's recent roundtable discussion. Six of the eight applicants have indicated their willingness to work together to resolve the mutual exclusivity.<sup>10</sup> All licensing options should be considered carefully before the Commission acts on the pending applications.

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applications cannot be determined.

<sup>10</sup> See Letter from Al Catalano, et al. to Scott Blake Harris dated January 26, 1996 (request by Final Analysis, GE Americom, Orbcomm, Starsys and VITA for status conference); Letter from Leslie Taylor to Scott Blake Harris dated January 29, 1996 (E-SAT supporting request).

#### 4. Financial Qualifications

At present, applicants are required to demonstrate their ability to construct, launch and operate for one year the first two satellites in their systems.<sup>11</sup> The Commission should determine whether this financial qualification standard should be applied to the second-round applicants. The Commission recently modified the financial qualification standards for the fixed satellite service in its DISCO I Order,<sup>12</sup> but did not consider similar changes for the Mobile Satellite Service.

#### 5. WRC-97 Spectrum Issues

Significant efforts are already underway in the Little LEO community to gain additional spectrum allocations at WRC-97. Commission action on the pending applications raises a number of issues affecting these preparations.

If the Commission acts to dismiss any of the pending applicants, it is unlikely that these applicants will devote any resources to gaining additional spectrum allocations at WRC-97. Because of the need for intense, coordinated lobbying efforts on a worldwide scale, all possible efforts should be made to retain all pending applicants in this processing round.

In addition, the Commission should consider granting the pending applicants priority or exclusive access to any additional spectrum allocations that are gained at WRC-97. Allowing new applicants to apply for this spectrum would be unfair to the pending applicants, whose combined efforts and significant

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<sup>11</sup> 47 C.F.R. § 25.142(a)(4).

<sup>12</sup> Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, FCC 96-14, released January 22, 1996.



expenditures over the preceding five years will have contributed substantially to any new allocations for NVNG MSS. As noted earlier, the Commission anticipated that additional allocations would become available as the result of WRC-95 for use by the current second-round applicants. It is now clear that significant additional allocations will not be made until WRC-97. Thus, spectrum will not become available for use by second-round applicants until well after the time the Commission anticipated in its first-round licensing order. Because the Commission anticipated using WRC-95 spectrum to license second-round applicants and only minimal allocations were obtained, it is logical for the Commission to limit access to WRC-97 spectrum to the second-round applicants. As the Commission stated with regard to first-round licensing, while "maximum entry" is a major concern in licensing NVNG MSS, "it must not take precedence over our ability to license viable systems."<sup>13</sup> Thus, while trying to maximize the number of competitive systems, the Commission must ensure that those competitors have enough spectrum to compete effectively.

#### 6. CTA's Pending Amendment

CTA has filed an amendment to its application to add frequencies allocated to Region 2 at WRC-95. Under Section 25.115(b) of the Commission's Rules, a 30-day cut-off period has begun following the filing of the amendment, with competing applications and comments due on February 23, 1996. In order to preserve their rights to this spectrum, other applicants are likely to file similar amendments before the Commission acts on this Petition. If the Commission initiates a rulemaking proceeding pursuant to this Petition, these amendments should be returned so that future amendments may be filed in conformity with the results of this proceeding.

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<sup>13</sup> NVNG MSS Licensing Order, 8 FCC Rcd 8450 (1993) at ¶ 21.

7. Principles to Be Utilized in Processing Second Round Applications

In considering the appropriate rules to apply to the second processing round for NVNG MSS, E-SAT recommends that the Commission adhere to the following principles:

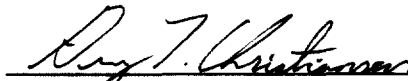
- 1) All second-round applicants must be considered simultaneously.
- 2) All pending applicants should be included. No action should be taken on any pending applications until the rulemaking is concluded. Licensing any of the pending applicants without thorough consideration of the issues outlined above would be highly irregular and prejudicial to all applicants.
- 3) All pending second-round applicants should be allowed to amend their applications to utilize the additional frequencies allocated at WRC-95.
- 4) Frequencies allocated at WRC-95 and WRC-97 should be available only to entities with applications pending in the second processing round.
- 5) The eligibility criteria and financial qualifications contained in the Commission's current NVNG MSS service rules should be utilized unless a compelling record is developed to utilize another standard.
- 6) A prime objective should be avoiding any mutual exclusivity among pending applicants and to provide for prompt licensing of all qualified applicants.
- 7) Another prime objective should be establishing a diverse and competitive NVNG MSS market. Market forces should determine which combination of service offerings, coverage areas, signal availability and other factors are most desired by the user community. In keeping with its prior rulings, the

Commission should promote a diverse array of systems to ensure service to the wide variety of markets that can be uniquely served by NVNG MSS.

III. Conclusion

For the reasons cited above, E-SAT respectfully requests that the Commission (1) initiate a rulemaking to establish second-round licensing rules, and (2) freeze all pending second-round applications until the conclusion of the rulemaking.

Respectfully submitted,



Leslie A. Taylor  
Guy T. Christiansen  
Attorneys for E-SAT, Inc.

February 14, 1996